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Negative impact of unilateral coercive measures on the enjoyment of human rights

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy, submitted in accordance with Human Rights Council resolutions 36/10 and 37/21.

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Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights

Summary

In the present report, the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights considers some recent developments concerning unilateral sanctions on 10 countries. He then focuses on some legal issues arising from the use of unilateral coercive measures during times of war and of peace. He also suggests potential remedies and redress for victims of unilateral coercive measures and proposes that concerned States submit a request for an advisory opinion to the International Court of Justice on the legality of unilateral coercive measures under international law.

I. Introduction

1. The present report is the fourth report submitted by the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights to the General Assembly pursuant to Human Rights Council resolution 27/21 and Assembly resolution 72/168.[1]

2. In the present report, the Special Rapporteur considers some recent developments concerning various ongoing sanctions regimes.[2] He then focuses on the issue of discrimination (and non-discrimination) in relation to unilateral sanctions. He also addresses the issue of possible mechanisms to ensure the availability of adequate remedies and redress for victims of unilateral coercive measures, then elaborates on the parameters and practical aspects of his suggestion that concerned States should, especially in the light of recent sanctions-related developments, submit a request for an advisory opinion to the International Court of Justice on the matter.

II. Overview of the activities of the Special Rapporteur

3. A summary of the latest activities of the Special Rapporteur is contained in his report to the Human Rights Council (A/HRC/39/54).

Recent developments regarding the use of unilateral sanctions

4. The past year has seen a number of significant developments regarding the use of unilateral sanctions against a number of countries. While there were positive developments in recent years, including the lifting (actual or intended) of various unilateral sanctions regimes, the current trend seems to point to a more frequent — if not systematic — use of unilateral sanctions as a foreign policy tool by certain countries. Owing to the unavailability of centralized and standardized data at the United Nations level, the Special Rapporteur provides, rather than a comprehensive "year in review" of unilateral coercive measures, a brief overview of key developments that have recently affected certain unilateral sanctions regimes and addresses some of the human rights concerns raised by those developments.

Belarus

5. Targeted sanctions imposed on Belarus by the United States of America since 2006, intended to deal with what the United States saw as "the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions and policies of certain members of the Government of Belarus and other persons to undermine Belarus's democratic processes or institutions", have recently been renewed for one year, on the basis of a determination made by the President of the United States in June 2018.[3] By contrast, the European

[1] General Assembly resolution 72/168, para. 26.

[2] The mandate of the Special Rapporteur refers to "unilateral coercive measures", understood as transnational, non-forcible coercive measures other than those enacted by the Security Council acting under Chapter VII of the Charter of the United Nations. The Special Rapporteur, however, uses the expressions "unilateral coercive measures", "unilateral sanctions", "international sanctions" and simply "sanctions" loosely and interchangeably in the present report.

[3] Notice regarding the continuation of the national emergency with respect to the actions and policies of certain members of the Government of Belarus and other persons to undermine democratic processes or institutions of Belarus, 8 June 2018. Available at www.whitehouse.gov/briefings-statements/notice-regarding-continuation-national-emergency-respect-actions-policies-certain-members-government-belarus-persons-undermine-democratic-processes/.

Union and Canada lifted most of their sanctions on Belarus in 2016. The extension of sanctions occurs amid reports of cuts to United States aid (through the United States Agency for International Development) to Belarus.[4]

Cuba

6. The Special Rapporteur cannot but deplore the tightening of United States sanctions against Cuba, through the additional measures enacted by the Government of the United States in November 2017.[5] The stated objective of the measures is to "cumulatively seek to channel economic activities away from the Cuban military, intelligence, and security services, while maintaining opportunities for Americans to engage in authorized travel to Cuba and support the private, small business sector in Cuba". This additional round of unilateral sanctions is all the more disappointing, given that the previous Administration had acknowledged the failure of sanctions and that "isolation hasn't worked", to borrow the words used in 2014 by the then President of the United States, Barack Obama, when announcing steps towards the normalization of relations with Cuba.[6]

Islamic Republic of Iran

7. The Special Rapporteur will continue to monitor closely the worrying developments related to unilateral sanctions on the Islamic Republic of Iran. He has devoted a section of his report to the Human Rights Council (A/HRC/39/54) to the announced reimposition of comprehensive sanctions on the country, coupled with secondary sanctions, intended to be the "strongest sanctions in history", in the words of the Government of the sanctioning country.[7] The Special Rapporteur takes this opportunity to reiterate that he is ready and willing to visit the Islamic Republic of Iran to evaluate the human rights impact of the sanctions there, as appropriate.

Democratic People's Republic of Korea

8. While welcoming the renewed prospects of engagement of the Democratic People's Republic of Korea with the international community and the confidence-building steps being taken on the Korean Peninsula, the Special Rapporteur notes with concern the reported impact of the sanctions in force (and possible overcompliance by financial institutions) on access to critical medicine and health care for thousands of patients in the country. According to reports, the Geneva-based Global Fund to Fight AIDS, Tuberculosis and Malaria, which in 2017 supported the treatment of about 190,000 citizens of the Democratic People's Republic of Korea with tuberculosis, has announced its withdrawal from the country, on grounds believed to relate to concerns of inadvertent sanctions violations.[8]

Qatar

9. The Special Rapporteur has already described the situation of Qatar in his previous report to the General Assembly (A/72/370), noting that the coercive

[4] Tatyana Korovenkova, "Donald Trump khochet polnostyu prekratit finansovuyu podderzhku Belarusi" (Donald Trump wants to completely cease financial support for Belarus), 25 April 2017. Available at https://news.tut.by/economics/540834.html.

[5] United States, Department of the Treasury, "Treasury, Commerce, and State implement changes to the Cuba sanctions rules", press release, 8 November 2017.

[6] Justin Sink, "Obama on Cuba: isolation failed", The Hill, 17 December 2014. Available at http://thehill.com/homenews/administration/227427-obama-on-cuba-isolation-hasnt-worked.

[7] Mike Pompeo, Secretary of State, "After the deal: a new Iran strategy", remarks at The Heritage Foundation, Washington, D.C., 21 May 2018.

[8] Eric Talmadge (Associated Press), "U.S. 'maximum pressure' sanctions on North Korea keep medical care from thousands of patients", Global News, 14 July 2018.

measures in force raise a number of legal issues, and has indicated that he shares the concerns expressed by the United Nations High Commissioner for Human Rights in June 2017 that the measures adopted are overly broad in scope and implementation and have the potential to seriously disrupt the lives of thousands of women, children and men, simply because they belong to one of the nationalities involved in the dispute.[9] The Special Rapporteur also wrote in September 2017 to the Permanent Representative of Qatar to the United Nations Office at Geneva, suggesting that he seek ways to reconcile opposed viewpoints while avoiding undue declarations to the press. He regrets that, so far, efforts undertaken within his mandate through quiet diplomacy to favour a positive evolution of the issue between source and target countries of the sanctions have not achieved any progress. The Special Rapporteur, having indicated since the outset his availability and willingness to conduct a mission to Qatar to assess the human rights impact of the measures, has recently received an official invitation from the Government of Qatar to conduct a visit in that country.

Russian Federation

10. In his latest report to the Human Rights Council (A/HRC/39/54), the Special Rapporteur addressed the additional extraterritorial sanctions on the Russian Federation announced in April 2018 by the United States,[10] designating seven Russian "oligarchs" and "12 companies they own or control", as well as 17 senior Russian government officials and a State-owned Russian weapons trading company and its subsidiary, a Russian bank.[11] These sanctions are widely believed to jeopardize the prospects of Nord Stream 2, the €9.5 billion gas pipeline project from the Russian Federation to Germany, owing to the probable difficulties that the project will face in obtaining adequate financing from Western banks.[12] The Special Rapporteur has also drawn attention to the case of Rusal, a Russian company, which is the world's biggest aluminium producer outside China, recently added by the United States to its Specially Designated Nationals and Blocked Persons List.[13] The sanctions are likely to adversely affect the daily life of nearly 100,000 innocent people employed by Rusal across its international operations and offices in several countries and not only in the Russian Federation, as well as of tens of thousands who depend on those jobs.

Sudan

11. The Special Rapporteur has welcomed the confirmed termination of the remaining United States sanctions on the Sudan, previously applied under Executive Orders 13067 and 13412, which were formally revoked in October 2017. He underlines that his mandate and that of the Independent Expert on the situation of human rights in the Sudan contributed through quiet diplomacy to the lifting of sanctions, as stressed by the Government of the Sudan in a letter dated 20 January 2017 addressed to the Special Rapporteur.

[9] A/72/370, paras. 16–18.

[10] For an overview and analysis of the measures currently in force against the Russian Federation, see A/HRC/36/44/Add.1.

[11] United States Department of the Treasury, "Treasury designates Russian oligarchs, officials, and entities in response to worldwide malign activity", 6 April 2018. Available at https://home.treasury.gov/news/featured-stories/treasury-designates-russian-oligarchs-officials-and-entities-in-response-to.

[12] Mathias Brüggmann, Moritz Koch and Torsten Riecke, "US sanctions on Russia hit Nord Stream 2 gas line, European companies", *Handelsblatt*, 11 April 2018.

[13] Polina Devitt and Dmitry Zhdannikov, "Exclusive: Rusal seeks sanctions relief via board changes, exports at risk if plan fails — sources", Reuters, 27 April 2018.

Bolivarian Republic of Venezuela

12. The Bolivarian Republic of Venezuela continues to be subjected to a series of sanctions programmes enacted by the United States, the European Union, Canada, Switzerland and Panama. The Government of the Bolivarian Republic of Venezuela has circulated documentation regarding the negative impact of these measures. It has highlighted in particular the additional measures imposed under Executive Order 13808, signed on 24 August 2017 by the President of the United States, which targets the State-owned oil industry corporation Petróleos de Venezuela through restrictions on negotiation of new debt issued by the Government or the corporation. According to the country, "this translates into serious consequences for the Venezuelan financial system, closing the possibility of issuing and negotiating optimally new debt, which may lead to the breach of the obligations internationally incurred by the Republic, placing the assets that are outside the national territory at serious risk, which potentially can be subject to embargo and executed for the forced and anticipated fulfilment of the obligations contracted by the country".[14] The Government claims that the 22 sets of coercive measures against the country, taken together, amount to "economic blockade" which affects the enjoyment of human rights of the population.

Zimbabwe

13. The orderly change of power from the then President Robert Mugabe in Zimbabwe in November 2017 gave the Special Rapporteur an opportunity to call upon the international community, along with the Independent Expert on the promotion of a democratic and equitable international order, to respond by lifting sanctions on the country. While he welcomed the emergence of a new era, which must be based on democracy and the rule of law, the Special Rapporteur stressed that such change could not happen "under the shadow of economic coercion".[15] He noted that sanctions had been in place since the early part of the twenty-first century and had led only to the suffering of ordinary people rather than bringing about political change. It was time for political dialogue and the restoration of a functioning economy. The human rights of ordinary Zimbabweans suffered greatly from the consequences of sanctions. The sanctions could not be said to be "limited" or "targeted", as the people and companies affected represented the vast majority of the economy. It had been observed that some businesses were currently "overcomplying" with the sanctions because of confusion over their scope.[16]

State of Palestine

14. On 17 April 2018, the Special Rapporteur issued a joint statement with the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967; and the Special Rapporteur on the rights to freedom of peaceful assembly and of association. The special procedures mandate holders echoed the United Nations and the International Criminal Court, which have expressed grave concern about the use of force by the Israeli security forces in previous weeks which led to the killing and wounding of dozens of mostly unarmed protesters in the Gaza Strip. On that occasion,

[14] Permanent Mission of the Bolivarian Republic of Venezuela to the United Nations Office and other international organizations in Geneva, "On the economic war and unilateral coercive measures against the Bolivarian Republic of Venezuela", 12 July 2018.

[15] OHCHR, "Zimbabwe sanctions should end to boost post-Mugabe economy, UN experts urge", 27 November 2017.

[16] Ibid.

the mandate holders called for "an immediate end to the 11-year-old comprehensive blockade on Gaza, which is imposing untold suffering on the population". They added, "We cannot continue to ignore this collective punishment of the people of Gaza, and the undeniable human rights impacts of the blockade. ... Collective punishment is prohibited under international law, and there must be international accountability for such actions."[17]

III. Issues of discrimination (and non-discrimination) in relation to unilateral sanctions

15. In the present report, the Special Rapporteur underlines a paradox that has come to light in the course of his investigations and research activities related to his mandate. That paradox lies in the fact that sanctions, at least sanctions of a certain type in determined cases, have the potential to, and in certain instances actually do, harm human rights — and contravene principles of humanitarian law — in a twofold, and apparently antithetical, manner: they unlawfully fail to discriminate and, from a different perspective, at the same time unlawfully discriminate. To explain the basic line of reasoning in the present section, international sanctions often fail to discriminate between combatants and civilians (and between civilian objects and military objectives), as they would be expected to do under the basic requirements of international humanitarian law. At the same time, unilateral sanctions may unlawfully discriminate against persons on the mere basis of their nationality, national origin or place of residence. The Special Rapporteur stresses that the recognition of this paradox is not a mere theoretical, or doctrinal, exercise, since it potentially has far-reaching practical consequences and gives further weight to previous recommendations formulated from the mandate, and supports the additional recommendations submitted in the present report.

A. Sanctions and the requirement of discrimination under international humanitarian law

Relevance of international humanitarian law to the evaluation of sanctions

16. As the Special Rapporteur has previously stated, the core rules of international humanitarian law (law of armed conflict) may be of relevance in cases of unilateral coercive measures affecting basic human rights or the civilian population at large.[18] However, conceptual difficulties may arise, as the normative understanding of international humanitarian law is that it governs State conduct only during an armed

[17] Office of the United Nations High Commissioner for Human Rights (OHCHR), "UN human rights experts condemn killings of Palestinians near Gaza fence by Israeli security forces", 17 April 2018.

[18] See A/71/287, para. 28, and A/HRC/30/45. Similarly, OHCHR has stated that humanitarian law provisions, such as the prohibition against the starvation of a civilian population as a method of warfare and the obligation to permit the free passage of all consignments of essential foodstuffs and medical supplies, are crucial for the evaluation of economic coercive measures (see A/HRC/19/33).

conflict.[19] This is apparent from the provisions of the Geneva Conventions and the Additional Protocols, which recognize this contextual limitation. From that normative understanding, international humanitarian law "would only serve as a legal framework for understanding the use and limits of economic sanctions when sanctions are used during an armed conflict".[20]

17. However, it has been argued that international humanitarian law "serves as the most appropriate paradigm through which economic sanctions should be governed, even when implemented outside the armed conflict context".[21] This view may be grounded in various arguments. First, it is obvious that damages, particularly collateral damages, may be caused by non-military coercive instruments such as economic sanctions, in the same way as by military action. This may call for the application of international humanitarian law in order to suppress what has been called a "persistent blind spot in international legal analysis".[22] Second, it has been stressed that the rules of international humanitarian law "constitute, at minimum, the lowest threshold that economic sanctions must meet. This accords consistency with the principle of *argumento a majore ad minus*, which demands that what is considered the minimum standard applicable in armed conflict, also applies during peacetime".[23] Third, it was observed that:

> Economic sanctions, as tools generally employed when tensions arise between States, are best situated in the context of [international humanitarian law]. In the spectrum of international relations, extending between peaceful relations and armed conflict, both the purpose and effect of sanctions makes them appear similar to acts of conflict and thus closer to the latter end of that spectrum. Sanctions are by definition coercive tools applied when normal diplomatic relations either break down or are deemed futile. They are often accompanied by threats of additional sanctions or even the use of force. They are designed to compel the targeted State to comply with the demands of the international community or the sanctioning State(s). In employing such pressure, sanctions place a significant toll on those inside the targeted State. In light of these characteristics, it is axiomatic that economic sanctions are employed when there exists a crisis or conflict serious enough to warrant such intervention.[24]

18. Therefore, economic sanctions would call for the application of international humanitarian law as "the ultimate reference in situations of crisis and conflict".[25]

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[19] The concept of armed conflict used in the Geneva Conventions and other instruments of international humanitarian law has been clarified by the jurisprudence of international courts and tribunals and legal doctrine. International armed conflicts involve the use of (military) force between States, whereas non-international armed conflicts involve the use of such force between a State's armed forces and a non-governmental armed group or groups or between such armed groups. For a non-international armed confrontation to be considered an armed conflict, the hostilities must reach a minimum level of intensity and the parties involved in the conflict must possess a minimum of organization. See generally Dietrich Schindler, "The different types of armed conflicts according to the Geneva Conventions and Protocols", *Collected Courses of the Hague Academy of International Law*, vol. 163 (1979).

[20] Nema Milaninia, "*Jus ad bellum economicum* and *jus in bello economico*: the limits of economic sanctions under the paradigm of international humanitarian law", in *Economic Sanctions under International Law*, Ali Z. Marossi and Marisa R. Bassett, eds. (The Hague, T.M.C. Asser Press, 2015), pp. 95–124, at p. 97.

[21] Ibid., p. 98.

[22] W. Michael Reisman and Douglas L. Stevick, "The applicability of international law standards to United Nations economic sanctions programmes", *European Journal of International Law*, vol. 9, No. 1 (1998), pp. 86–141, at p. 95.

[23] Milaninia, "*Jus ad bellum economicum* and *jus in bello economico*", pp. 102–103.

[24] Ibid.

[25] Ibid.

19. There have been a number of official statements to the effect that economic sanctions should abide by the rules of international humanitarian law.[26] In 1995, for example, the five permanent members of the Security Council, in a non-paper on the humanitarian impact of sanctions (S/1995/300, annex), stated that "future sanctions regime[s] should be directed to minimize unintended adverse side effects of sanctions on the most vulnerable segments of targeted countries" and that "the short- and long-term humanitarian consequences of sanctions" should be factored into designing such programmes. An analysis of the practice of the Security Council gives weight to the idea that the Council accepts that it is bound to observe humanitarian limits in its application of sanctions.[27] In his 1999 report on the work of the United Nations (A/54/1), the then Secretary-General Kofi Annan similarly noted:

> It is increasingly accepted that the design and implementation of sanctions mandated by the Security Council need to be improved, and their humanitarian costs to civilian populations reduced as far as possible. This can be achieved by more selective targeting of sanctions, as proponents of so-called "smart sanctions" have urged, or by incorporating appropriate and carefully thought through humanitarian exceptions directly in Security Council resolutions.

20. An argument may also be made that, following the reasoning used by the International Court of Justice in the *Corfu Channel* case[28] and in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,[29] "the obligation to provide essential goods and foodstuffs contained in the Geneva Conventions and Additional Protocols and applicable in time of war applies also in peacetime, since the obligations do not derive only from the Conventions themselves but from the general principles of humanitarian law to which the Conventions merely give specific expression".[30]

21. In the light of all these elements, it is reasonable to argue, as a number of scholars have done, that international humanitarian law, or at least principles derived from that body of law, should apply to the imposition of economic sanctions by States acting both unilaterally and under the authorization of the Security Council, even during peacetime.[31] Arguing that those criteria found in the law of armed conflict are not applicable (at least mutatis mutandis) to economic sanctions (especially those amounting to de facto blockades) would lead to an absurd, unacceptable outcome, as civilians would then be deprived in peacetime of the protection offered in wartime by international humanitarian law against the very same kinds of measures.

Rules derived from international humanitarian law applicable to sanctions

22. The principle of distinction, one of the core principles of international humanitarian law, requires States to distinguish between combatants and military objectives on the one hand, and non-combatants and civilian objects on the other, and to direct their attacks only against the former.[32] Any use of force must be

[26] Ibid.

[27] Mary Ellen O'Connell, "Debating the law of sanctions", *European Journal of International Law*, vol. 13, No. 1 (2002), pp. 63–79, at p. 74.

[28] *I.C.J. Reports 1949*, pp. 22–23.

[29] *I.C.J. Reports 1986*, p. 114.

[30] Anna Segall, "Economic sanctions: legal and policy constraints", *International Review of the Red Cross*, vol. 81, No. 836 (December 1999), pp. 763–784.

[31] See A/71/287.

[32] Christopher Greenwood, "Historical development and legal basis", in *The Handbook of International Humanitarian Law*, 2nd ed., Dieter Fleck, ed. (Oxford, Oxford University Press, 2008), p. 37.

demonstrably necessary, proportional to the necessity and capable of discriminating between combatants and non-combatants.[33]

23. The principle of distinction aims to ensure the protection of the civilian population in situations of international armed conflicts. The scope of this protection is set forth, for example, in the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), adopted in 1977, article 51 of which provides that the civilian population "shall enjoy general protection against dangers arising from military operations" and that the civilian population "shall not be the object of attack". The same provision prohibits "indiscriminate attacks", defined as:

(a) Those which are not directed at a specific military objective;

(b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) Those which employ a method or means of combat the effects of which cannot be limited as required by the Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

24. Attacks against the civilian population or civilians by way of reprisals are prohibited.[34] Finally, civilian objects, that is, those which are not military objectives, shall not be exposed to attack or to reprisals.[35]

25. When evaluated against the rules of international humanitarian law, sanctions would qualify as unlawful action if indiscriminate and failing to distinguish combatants from non-combatants and civilians, which is actually the case both in certain situations of sanctions applied in wartime and in peacetime, as explained below.

Economic sanctions applied in connection with military operations in the course of an armed conflict

26. When sanctions are imposed in the context of an armed conflict (whether international or internal), general rules on the protection of civilians against the effects of military operations fully apply. Thus, the decision to impose such measures must take international humanitarian law standards into account, in particular the rules relating to medical and food supplies to different categories of protected persons.[36]

27. These rules include the prohibition on starvation of the civilian population, and the right to humanitarian assistance, through the free passage of medical and hospital consignments and objects necessary for religious worship intended only for the civilian population, and of essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers and maternity cases.[37]

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[33] Knut Ipsen, "Combatants and non-combatants", in *The Handbook of International Humanitarian Law*, 2nd ed., Dieter Fleck, ed. (Oxford, Oxford University Press, 2008). See also Reisman and Stevick, "The applicability of international law standards", p. 94.

[34] Protocol I, art. 51.

[35] Ibid., art. 52.

[36] Segall, "Economic sanctions".

[37] Ibid.

28. The same principles of freedom of passage of relief supplies shall apply to situations of naval blockades,[38] as well as to occupied territory.[39] The occupying Power is under a duty to ensure that the civilian population receives food and medical supplies, and an obligation to accept and facilitate relief operations on behalf of the said population if the whole or part of the population is inadequately supplied. Moreover, all States parties shall permit the free passage of these consignments and shall guarantee their protection. This means that relief consignments for the population of an occupied territory must be allowed to pass through the blockade, and this obligation is further accompanied by an obligation to guarantee their protection. Thus, all States concerned must respect the consignments and protect them when they are exposed to danger through military operations.[40]

29. It behoves the international community to ascertain that actual situations of unilateral economic sanctions such as those which have occurred in recent international armed conflicts shall be tested against the rules of international humanitarian law set forth above.

30. The severe financial and economic blockade imposed on the Gaza Strip, the consequences of which have been repeatedly documented, has induced a catastrophic humanitarian situation in which multiple breaches of rules of international humanitarian law can be identified.[41] The Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 has found the blockade to constitute "collective punishment of the people of Gaza, contrary to article 33 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)".[42]

31. The blockade imposed on Yemen in connection with the military operations of the coalition, including the siege and blockade of the Hudaydah port, which impeded the entry of relief supplies to millions of civilians in urgent need of humanitarian assistance, was another case in point. The Special Rapporteur has already deplored the unwarranted restrictions on the flow of commercial and humanitarian goods and services into Yemen, involving a variety of regulatory measures enforced by the coalition forces, including unreasonable delay and/or denial of entry to vessels in Yemeni ports. He also wishes to reiterate and emphasize the finding of the United Nations Development Programme Country Director in Yemen, who stated on 1 August 2017 that "the current food security crisis is a man-made disaster not only resulting from decades of poverty and underinvestment, but also as a war tactic through economic strangulation".[43]

32. The economic sanctions imposed since 2011 on the Syrian Arab Republic have been reported as having seriously impaired the ability of Syrian civilians to earn a living, in addition to the ongoing hostilities.[44] The Special Rapporteur noted in the outcome statement of his visit to the Syrian Arab Republic in May 2018 that, because of their comprehensive nature, the sanctions enforced against the country have had a devastating impact on the entire economy and the daily lives of ordinary people. That impact has compounded their suffering resulting from the devastating crisis that has unfolded since 2011. He observed that the sufferings imposed by the sanctions have reinforced those caused by the conflict. Indeed, it seems ironic that these measures applied by source States and extended for another year in June 2018 out of a concern

[38] Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 23, cited in Segall, "Economic sanctions".

[39] Fourth Geneva Convention, art. 59.

[40] Segall, "Economic sanctions".

[41] A/72/370, para. 12.

[42] See A/70/392.

[43] A/72/370, paras. 31–32.

[44] See A/71/287 and A/HRC/31/68.

for human rights are actually contributing to the worsening of the humanitarian crisis as an unintended consequence.

Economic sanctions applied in peacetime

33. The Special Rapporteur again stresses that, where unilateral coercive measures are applicable outside armed conflict, the relevant provisions of international humanitarian law remain applicable in evaluating the admissibility of those measures.[45] If, as mentioned above, the safeguards of international humanitarian law have been established primarily to protect the civilian population against the effects of military operations in an armed conflict, it remains that there is no valid reason why these safeguards should not apply to economic sanctions imposed outside an armed conflict.[46]

34. De facto blockades imposed as a result of measures aimed at the "economic isolation" of the target country, through restrictions or prohibitions of imports and exports abroad and transfers of goods between the target and the rest of the world, arguably entail some form of prohibited "collective punishment" and cannot be justified under the rules of international humanitarian law.

35. In addition, in cases where medical equipment, medicines and other items necessary to meet basic human rights, which are theoretically exempt from restrictive measures, are in reality unavailable because of restrictions on financial transfers and payments, it may be thought that the ensuing situation amounts to unlawful blockade, or is comparable to collective reprisals, which are banned under humanitarian law.[47]

36. The Special Rapporteur considers that, notwithstanding the legal intricacies and technicalities related to the scope of application of the Geneva Conventions and related instruments, legal rights holders in target countries where the negative impact of such measures is particularly acute could be considered as in a war zone. They would thus be entitled to benefit from the protection of humanitarian law, which has the advantage of being neutral, while the context of unilateral coercive measures is very heavily charged politically. When payments and financial flows are affected by de facto bans on the use of international telecommunications payment mechanisms, independent procurement agencies of third countries could be involved in providing humanitarian supplies in peacetime for target countries.[48]

B. Sanctions and the prohibition of discrimination under human rights law

37. In his report to the Human Rights Council at its thirty-ninth session, the Special Rapporteur has underlined that there exist strong legal arguments that sanctions may have a discriminating effect on the basis of the country of residence, or nationality, of the targeted populations. This is, the Special Rapporteur believes, a point of extreme importance, which unfortunately has been largely overlooked. If one considers the practical effects of comprehensive embargoes used in conjunction with secondary sanctions aimed at the "economic isolation" of the population of the target State, it is possible and reasonable to view these effects as amounting to a massive discrimination based on nationality, national origin or place of residence. A case at

[45] See A/71/287.

[46] Hans-Peter Gasser, "Collective economic sanctions and international humanitarian law: an enforcement measure under the United Nations Charter and the right of civilians to immunity — an unavoidable clash of policy goals?", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 56 (1996), pp. 871–904, at p. 885.

[47] A/HRC/30/45, para. 42.

[48] Ibid.

hand is that of the United States unilateral comprehensive measures targeting the Islamic Republic of Iran, under which Iranian people, living either in the country or abroad, are de facto deprived of the opportunity of conducting normal business (and other) relations with foreign counterparts.

38. That situation is all the more controversial given that the overwhelming majority of affected persons in this case are not "blacklisted" individuals, persons engaged in illicit activities or objectionable behaviour, or even State officials targeted on the grounds of their belonging to the State apparatus of a targeted regime, but members of the civilian population at large, which bears no responsibility for the dispute. It is the place to recall the observation made by the Committee on Economic, Social and Cultural Rights in paragraph 16 of its general comment No. 8 (1997) on the relationship between economic sanctions and respect for economic, social and cultural rights, that the inhabitants of a given country do not forfeit basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms of international peace and security.

Prohibition of discrimination in international law and national legislation

39. The prohibition of discrimination is enshrined in the Charter of the United Nations, Article 1 of which describes one of the four purposes of the Organization as "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion", as well as in a number of human rights instruments, to which the main sanctions users are parties. Discrimination based on nationality or national origin violates, inter alia, article 26 of the International Covenant on Civil and Political Rights and articles 1 and 2 of the International Convention on the Elimination of All Forms of Racial Discrimination. Article 1 of the latter instrument defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".[49] Most national legal systems of the world reflect such inadmissibility of discrimination as a basic rule of protection of human rights, mirroring the requirement of equality before the law.

40. From the viewpoint of international economic law, nationwide economic sanctions can be said to contradict some of the key principles underlying the multilateral trading system, including the principle of non-discrimination, which is expressed in most-favoured-nation treatment and national treatment clauses, embodied in the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights and various other agreements of the World Trade Organization (WTO). Although WTO member States could still argue that sanctions, despite their discriminatory effects, are lawful derogations from the States' WTO obligations, relying on "security exceptions" in accordance with article XXI of the General Agreement on Tariffs and Trade, the Special Rapporteur believes, as he stressed in a previous report, that this provision is not self-adjudicating and should be reviewed on an ad hoc basis by the WTO dispute settlement mechanisms.[50]

[49] See generally E. W. Vierdag, *The Concept of Discrimination in International Law* (The Hague, Martinus Nijhoff, 1973).

[50] A/HRC/33/48, para. 30.

Legal remedies against discriminatory measures

International forums

41. Subject to the fulfilment of applicable jurisdictional requirements in each particular case, victims of discrimination may be entitled to bring legal challenges before international courts or tribunals, or human rights bodies such as the Committee on the Elimination of Racial Discrimination. The Special Rapporteur has already referred, in his report to the Human Rights Council at its thirty-ninth session, to the initiation by Qatar of contentious proceedings before the International Court of Justice,[51] based on alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination through the imposition of unilateral coercive measures on Qatar by several countries. The Court, as the principal judicial organ of the United Nations, is thereby given a unique opportunity to clarify in general the legal issues related to the practice of sanctions under international law (including international human rights law), in particular this very issue of the discriminatory effect of comprehensive sanctions and embargoes.

Domestic challenges

42. Legal challenges to sanctions based on the invocation of their discriminatory nature have been witnessed in past years. To give only one example, in the United Kingdom of Great Britain and Northern Ireland, a number of Iranians and persons of Iranian descent brought a series of legal proceedings against several banks, arguing that they had been subjected to racial discrimination by the banks, in breach of the provisions of the Equality Act 2010, after their bank accounts had been closed.[52] It was reported that compensation had been obtained by claimants in most of those cases, often as a result of pretrial settlements, but it is difficult to obtain reliable and exhaustive data on those proceedings.

43. It is unlawful under various (national) legal systems to participate in "boycotts" not decided upon by the competent authorities of the State concerned, and such prohibitions usually equally apply to any comprehensive economic sanctions and embargoes. Thus, in Germany, section 7 of the German Foreign Trade and Payments Ordinance provides that issuing a declaration in foreign trade and payment transactions whereby a resident participates in a boycott against another country is prohibited. In France, boycott clauses in contractual documents are also unlawful. To the extent that these clauses require a person to engage in discrimination not based on a valid law or regulation enacted by the State, these fall within the scope of articles 225-1 and 225-2 of the French Criminal Code on the offence of discrimination.[53] The rationale behind the provision in the German Ordinance appears to be the protection of trade relations between Germany and other States, whereas in France the prohibition is based on the fact that discrimination is a violation of human rights. Similar legal rules may exist in other countries, and further comprehensive research may be needed to assess this point.

[51] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*. Qatar submitted its application instituting proceedings on 11 June 2018. From 27 to 29 June 2018, the Court held hearings on the request for the indication of provisional measures submitted by Qatar.

[52] Saeed Kamali Dehghan, "Iranians sue UK banks over closed accounts, claiming racial discrimination", *The Guardian*, 28 March 2014.

[53] France, Directorate General of the Treasury, "Guide de bonne conduite/foire aux questions relatifs à la mise en œuvre des sanctions économiques et financières" (Guide to good practices/frequently asked questions relating to the implementation of economic and financial sanctions), version 3, 15 June 2016.

44. In the Netherlands, in past years some Iranian students were prevented from enrolling in universities for "sensitive" fields of study (such as nuclear physics) as a result of the sanctions in force that claimed to prevent nuclear proliferation. In certain cases, it was reported that legal challenges to such measures had been brought before domestic courts. The Government of the Netherlands has clarified that such "knowledge embargo" against the Islamic Republic of Iran was abolished in July 2015, under the terms of Security Council resolution 2231 (2015), in which the Council endorsed the Joint Comprehensive Plan of Action, concluded on 14 July 2015 between the Islamic Republic of Iran and China, France, Germany, the Russian Federation, the United Kingdom and the United States (E3+3). This change of policy has applied since 16 January 2016. However, a "knowledge embargo" applying to students from the Democratic People's Republic of Korea, based on the North Korea Sanctions Order 2017 adopted by the Netherlands in furtherance of Security Council resolution 1874 (2009), continues to apply.[54]

IV. The issue of the right to reparations

45. To the extent that the rules of international humanitarian law may come into play with respect to unilateral coercive measures, as has been suggested above, remedies generally (or potentially) available to victims of violations of the law of armed conflict may also be relevant to the situation of persons subject to sanctions. The Special Rapporteur has previously reflected on the right to a remedy for victims of violations of international humanitarian law,[55] as recognized, inter alia, by the Commission on Human Rights and the General Assembly in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[56] It would be paradoxical that victims of collective punishment, or of starvation-like measures, would have access to some form of remedies if the measures at issue were implemented in the course of an armed conflict, and would be deprived of such remedies for the same measures used in peacetime.

46. The Special Rapporteur also notes that the outcome of the ongoing proceedings before the International Court of Justice in the case of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* may have a tremendous impact on the legal situation of victims of human rights violations flowing from the implementation of unilateral sanctions. Should the Court find that unilateral coercive measures may entail, at least under certain conditions, violations of the Convention, it would confirm the possibility open to affected parties of bringing claims under the mechanisms set up under the Convention. In particular, the Committee on the Elimination of Racial Discrimination may consider individual complaints that allege a violation of an individual's rights under the Convention if the State party concerned has made the necessary declaration under article 14 thereof. The Convention also provides a mechanism for inter-State claims, whereby States have the possibility of bringing complaints of violations of the Convention committed by another State, through the establishment of an ad hoc Conciliation Commission.[57] Should the competence of the Committee on the Elimination of Racial Discrimination to address unilateral coercive measures be confirmed, which the Special Rapporteur believes is the correct legal position, this may be a means to satisfy, at least partially,

[54] Netherlands, Ministry of Education, Culture and Science, "Exemption certain engineering or nuclear-related courses of study".

[55] See A/71/287, para. 29.

[56] Liesbeth Zegveld, "Remedies for victims of violations of international humanitarian law", *International Review of the Red Cross*, vol. 85, No. 851 (September 2003), pp. 497–526.

[57] Arts. 11–13. See www.ohchr.org/en/hrbodies/tbpetitions/Pages/IndividualCommunications.aspx.

the need expressed by the Human Rights Council, in paragraph 15 of its resolution 34/13, for an independent mechanism of the United Nations human rights machinery for the victims of unilateral coercive measure to address the issues of remedies and redress, with a view to promoting accountability and reparations.

47. Article 22 of the Convention also incorporates a dispute settlement provision under which "any dispute between two or more States parties with respect to the interpretation or application of [the] Convention, which is not settled by negotiation or by the procedures expressly provided for in [the] Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement". This opens the possibility for States targeted by sanctions to challenge these measures before the Court as discriminatory in the meaning of the Convention, and to seek compensation for the damage suffered. It should be noted, however, that several States (including a State with a significant track record in the use of unilateral sanctions) have made reservations to the jurisdiction of the Court to hear disputes arising from the Convention, when signing or acceding to it.

V. The lawfulness (or unlawfulness) of sanctions under public international law and international human rights law: a recommendation for the submission of the issue to the International Court of Justice

48. The Special Rapporteur has already suggested that Member States concerned should consider submitting to the International Court of Justice, pursuant to Article 96 of the Charter of the United Nations, a request for an advisory opinion on the legality or otherwise of the unilateral coercive measures, especially under the angle of their compliance or otherwise with human rights norms.[58] Such an advisory opinion, even if not binding stricto sensu, would be of significance to the international community at large, given that unilateral sanctions increasingly affect States and their populations and have a significant impact on human rights and the international legal order, including the multilateral trading system. The Court could draw on relevant parts of its established jurisprudence, especially on the prohibition of intervention in international law. One relevant obiter dictum on that issue was formulated by Judge Alvarez in the *Corfu Channel* case, that:

> The intervention of a State in the internal or external affairs of another — i.e., action taken by a State with a view to compelling another State to do, or to refrain from doing, certain things — has long been condemned. It is expressly forbidden by the Charter of the United Nations. The same applies to other acts of force, and even to a threat of force.[59]

49. The Court may also be expected to apply to international sanctions applied in peacetime its findings in the same *Corfu Channel* case, regarding obligations of States "based ... on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war".[60] The Court could also find inspiration in its rich case law on human rights matters. To the extent that comprehensive unilateral sanctions would be found to be in violation of the prohibition of discrimination, the Court could restate the opinion of Judge Tanaka in

[58] A/HRC/33/48, paras. 24–26.

[59] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 9 April 1949, Individual Opinion by Judge Alvarez, I.C.J. Reports 1949*, p. 47.

[60] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 9 April 1949, I.C.J. Reports 1949*, p. 22.

the *South West Africa* cases, that "the principle of equality being in the nature of natural law and therefore of a supra-constitutional character, is placed at the summit of hierarchy of the system of law, and that all positive laws including the constitution shall be in conformity with this principle".[61]

50. For the General Assembly to take a decision to submit a request for an advisory opinion to the International Court of Justice, a resolution adopted by a simple majority vote appears to be sufficient.[62] On a practical level, it is recommended that concerned States submit (jointly if possible) to the United Nations (through the Office of the Secretary-General) a request, in accordance with rule 14 of the rules of procedure of the General Assembly, for inclusion in the agenda of the seventy-third session of the Assembly, under heading F, Promotion of justice and international law, of a supplementary item entitled "Request for an advisory opinion of the International Court of Justice on whether unilateral sanctions are in accordance with international law", with subsequent consideration of the item directly in plenary meeting. A draft explanatory memorandum, to be submitted in accordance with rule 20 of the rules of procedure, is annexed to the present report and could serve as a basis for discussions among the States concerned.

51. As regards the formulation of the question or questions that would form the request for an advisory opinion, the Special Rapporteur believes that its precise wording should be carefully drafted by a group of experts from concerned States. The Special Rapporteur would be prepared and willing to extend his assistance to the group, should it be set up by concerned States, in order to reach consensus and thus be in a position to submit the request at the earliest possible date. It is probably desirable that the question or questions to be put to the Court focus on the most widely accepted common ground regarding unilateral coercive measures. It could perhaps single out the legality of sanctions regimes that claim extraterritorial application (secondary sanctions) and have adverse effects on non-parties. The right to compensation for third parties adversely affected by sanctions should also be part of the question or questions raised. The annex to the present report is an example of such a request and can form the basis for discussion on this topic.

VI. Conclusions and recommendations

52. **The Special Rapporteur calls upon States to affirm and state clearly that unilateral sanctions, especially those of a comprehensive nature, in particular when aggravated by secondary sanctions seeking the "economic isolation" of the target country, amount to discrimination against the innocent population of the country concerned, in violation of the prohibition of discrimination enshrined in the main international human rights instruments including, but not limited to, the International Convention on the Elimination of All Forms of Racial Discrimination. This is not a partisan statement, but rather a legally correct understanding of the meaning of discrimination in accordance with the human rights instruments concerned, including the aforementioned Convention. The Special Rapporteur would like to see the Committee on the Elimination of Racial Discrimination, as the body entrusted with the interpretation of the content of human rights provisions of the Convention, affirm this understanding through a general recommendation (or a general comment) on sanctions as discriminatory measures under the Convention.**

[61] *South West Africa (Liberia v. South Africa), Judgment of 18 July 1966, Dissenting Opinion of Judge Tanaka, I.C.J. Reports 1966*, p. 306.

[62] A/HRC/33/48, paras. 24–26.

53. The Special Rapporteur reiterates his suggestion that the International Law Commission resume its work on "extraterritorial jurisdiction", initiated in 2006.[63] The Commission could be called upon to elaborate on, inter alia, the legal status and consequences of sanctions involving the unlawful assertion of jurisdiction by a source State or group of States on target States and a fortiori on third States.

54. The Special Rapporteur has also suggested, in his latest report to the Human Rights Council, the appointment by the Secretary-General of a special representative on unilateral coercive measures (or alternatively several special representatives, each in charge of a specific country sanctions regime, as appropriate). The mandate of a special representative on unilateral sanctions could encompass advocacy of respect for international law in matters related to unilateral coercive measures, the negotiation of relief measures, alleviation of the most indiscriminate measures and, ultimately, consensus promotion of the removal of unilateral sanctions at large. These issues clearly extend beyond the mandate of the Special Rapporteur, which is focused on the protection of human rights affected by sanctions. The Special Rapporteur could interact with the Special Representative on sanctions as appropriate.

55. Finally, in the current context of escalation in the use of unilateral sanctions and the reimposition of comprehensive embargoes merging through secondary sanctions into indiscriminate de facto blockades, it appears all the more relevant to consider establishing a consolidated central register at the level of the United Nations Secretariat to recapitulate the list of all unilateral sanctions in force.[64]

56. The Special Rapporteur has already recommended that States Members of the United Nations restate a set of basic principles to mitigate the adverse human rights effects of unilateral coercive measures, pending their complete elimination. In his latest report to the Human Rights Council, he has elaborated on two aspects of these basic principles, which he submits to States for consideration: (a) that the effects of sanctions regimes should be assessed (as a mandatory requirement) by means of human rights impact assessments, before the measures are implemented and as long as they remain in force; and (b) that the absence of effective mechanisms of judicial review of unilateral sanctions amounts to the violation of the right to a fair trial, and as such qualifies as a denial of justice, which is considered unlawful under virtually all legal systems of the world.

[63] See A/61/10, annex E, and A/72/370, para. 58.

[64] Draft elements on the United Nations register of unilateral sanctions likely to have a human rights impact have been appended to the previous report of the Special Rapporteur (A/HRC/36/44, appendix I) as a possible basis for multilateral negotiations aimed at the establishment of such a register.

Annex

Explanatory memorandum

1. The General Assembly has many times expressed its concerns about the adverse human rights impact of unilateral coercive measures, including in its most recent resolutions on this subject, namely resolutions 70/151, 71/193 and 72/168. The same concerns have been echoed in numerous resolutions of the Human Rights Council and the Commission on Human Rights, as well as in the forum of regional organizations, and by a majority of States Members of the United Nations. At the same time, the Assembly has repeatedly stressed that unilateral coercive measures and legislation are contrary to international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States. It has urged all States to cease adopting or implementing any unilateral measures not in accordance with international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States, in particular those of a coercive nature, with all their extraterritorial effects, which create obstacles to trade relations among States, thus impeding the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of individuals and peoples to development (see resolution 72/168).

2. The General Assembly has underlined that, despite the recommendations adopted on this question by the Assembly, the Human Rights Council, the Commission on Human Rights and recent major United Nations conferences, and contrary to general international law and the Charter, unilateral coercive measures continue to be promulgated and implemented, with all their negative implications for the social humanitarian activities and economic and social development of developing countries, including their extraterritorial effects, thereby creating additional obstacles to the full enjoyment of all human rights by peoples and individuals under the jurisdiction of other States (ibid.). In other words, despite all these resolutions and statements reflecting the beliefs and *opinio juris* of the overwhelming majority of the international community, certain Powers continue to use unilateral sanctions as tools for applying political or economic pressure against certain countries, in particular developing countries. This has led to a stalemate in the international community, where a handful of States that frequently use sanctions resist the views of the majority and assert that it is legitimate to use unilateral coercive measures for certain purposes.

3. It is believed that the most principled and sensible way to overcome conflicting views regarding the admissibility under international law, including human rights law and international humanitarian law, of unilateral coercive measures with special reference to those having an egregious human rights impact on innocent civilians, is to transfer the issue from the political to the juridical arena.

4. The [concerned countries] consider that the General Assembly, in view of the powers and functions conferred on it by the Charter of the United Nations, in particular by Articles 10, 13 and 96, has a crucial role to play in this regard.

5. The [concerned countries] believe that an advisory opinion of the principal judicial organ of the United Nations, the International Court of Justice, would be particularly appropriate to determine whether unilateral coercive measures as implemented and enforced by certain Powers are in accordance with international law.

6. All States Members of the United Nations would benefit from the legal guidance of an impartial advisory opinion of the International Court of Justice. It would enable them to evaluate the legal consequences arising from the continued application and

enforcement of unilateral coercive measures, and their own duties and responsibilities in respect of this situation.

7. It is believed that requesting the Court to clarify those legal issues would contribute to strengthening the rule of law in international relations.

8. Finally, an advisory opinion of the International Court of Justice would contribute to reducing international tensions raised by unilateral sanctions and alleviating the sufferings of affected persons and groups, promote accountability and facilitate efforts aimed at dialogue and international understanding.